IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 266 of 1980

to

Second Appeal No. 271 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MOHMEDBHAI RASULBHAI MALEK

Versus

AMIRBHAI RAHIMBHAI MALEK

Appearance:

MR MH DAYAMAKUMAR for appellants in all Appeals

MR SK BUKHARI for Respondents in all appeals.

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 25/07/2000

COMMON ORAL JUDGEMENT

1. This judgment shall govern disposal of this batch of six Second Appeals which are filed against the common judgment and decree dated April 22, 1980 rendered in six Regular Civil Appeals being Regular Civil Appeal Nos. 50 of 1979 to 55 of 1979 by the learned 2nd Extra Assistant Judge, Vadodara and were admitted for hearing at the instance of the original plaintiffs on the following substantial questions of law:

(1) Whether the certified copies of the judgments recognising the custom contained in documents M.17/3 and 85/1 are inadmissible in evidence?

(2) Whether the certified copy of a document dated 15.9.1909 contained in M.17/1 is admissible in evidence and whether it establishes the custom in question?

(3) Whether S.2 of the Shariat Act, 1937 abrogates one and all customs, including even succession, to agricultural land?

(4) Whether the documents produced and witnesses examined prove the alleged custom by which the daughters are excluded from inheritance and widows take only a life estate?"

2. The appellants are the original plaintiffs whereas the respondents are the original defendants and for the sake of convenience and brevity the parties are hereinafter referred to as 'the plaintiffs' and 'the defendants' in this judgment.

3. The facts giving rise to this batch of appeals move in a narrow compass.

3.1. The plaintiffs who claim to be the nephews of deceased Dulbha Doda filed six separate suits being Regular Civil Suit Nos. 137 of 1977 to 142 of 1977 against the defendants claiming that Dulbha died in the year 1927 leaving behind his agricultural land which came to the share of his widow Nurbibi. Nurbibi also died on November 15, 1975. Rasulbhai, the daughter of Dulbha had expired prior to the death of Nurbibi. Rasulbhai Amirbhai, father of plaintiff Nos.1 and 2, had expired about 4 months prior to the institution of the suits. It was the case of the plaintiffs that their forefather Rasulbhai Jayatabhai was of Malek Caste and the custom of customary succession was prevailing amongst Malek of

village Anti. The customary law of such succession excludes a widow and daughter from inheritance and as per the custom, the widow has only life time interest or limited estate and, therefore, a widow cannot alienate or transfer the property and on her death, the property reverts to the male heirs of her husband. According to the case of the plaintiffs, on death of Dulbha Dada, his widow Nurbibi had only life time interest in the property left behind by Dulbha Dada and she had no right to sell or gift or mortgage the property received by her from her deceased husband Dulbha Dada since the said custom has been in existence in Malek Community of Anti village since the time immemorial. It was further case of the plaintiffs that in the year 1909 the community of Malek of village Anti made a recital. In the said recital the said custom was incorporated and, therefore, the said custom was also judicially recognised.

3.2. Notwithstanding the above customary law, Nurbibi who was the widow of Dulbha Dada inherited the agricultural land over which she had a right to maintenance only during her lift time and had no right to alienate or transfer the property, executed a registered gift deed dated June 19, 1952 in respect of the suit land bearing S.Nos. 287, 288, 469, 473, 178, 278, 602/2, 601/2 and the house bearing No. 400 in favour of Amir Rahim, the defendant in Regular Civil Suit No. 137 of 1977. Similarly, Nurbibi executed a registered sale deed dated February 13, 1952 in respect of S.Nos. 50/1 and 50/2 in favour of Hasanbhai Musafbhai, the defendant in Regular Civil Suit No.140/77. She also executed a registered sale deed dated June 16, 1952 in respect of S.Nos. 662/6 and 657 in favour of Saiyed Sadatali Bhaiba, the defendant in Regular Civil Suit No. 138 of 1977. She executed another registered sale deed dated November 30, 1967 in respect of S.No. 434 in favour of Amirbhai Sultanbhai, the defendant in Regular Civil Suit No. 142/77. She also executed a registered sale deed dated April 5, 1961 in respect of land bearing S.Nos. 405/1 and 52/1 in favour of Rahimbhai Pyarbhai, the defendant in Regular Civil Suit No. 141/77. She further executed a registered gift deed on April 27, 1961 in respect of the agricultural land bearing S. No. 569 in favour of Hasanbhai Fazalbhai, defendant in Regular Civil Suit No. 139 of 1977.

3.3. It was the case of the plaintiffs that the gifts and sales effected by Nurbibi referred to above in favour of the defendants are null an void and the said alienations were not binding to the plaintiffs. The plaintiffs, therefore, prayed for the declaration that

the alienations made by Nurbibi are null and void and are not binding to the plaintiffs. They also sought for the possession of the suit properties from the defendants so also the mesne profits.

3.4. It may be appreciated that in all the suits the plaintiffs are common whereas the defendants are the different persons in whose favour the sale and gift deeds were executed by Nurbibi. The defendants - alienee had contested the suits by filing written statement separately in each suit and thereby they denied the averments made in the plaint. They also challenged the pedigree shown in the plaint. They contended that deceased Dulbha had also left one son namely Ibrahim and a daughter Rasulbibi. They denied existence of the custom as alleged by the plaintiffs and have reiterated that Malek community of village Anti are governed by Mohammedan Law. They also emphasised that Nurbibi had the right and authority to transfer and alienate the property. They also contended that the suits were barred by limitation and they have become the owners by adverse possession. Lastly they contended that by virtue of the gift and sale deeds they were put in actual and physical possession of the properties in question and since then they were cultivating the said land and also paying the assessment as their names have been muted in the revenue record. Therefore, the defendants prayed for dismissal of the suits.

3.5. The trial Court framed identical issues in all the suits and since common question of law and facts had arisen in all the suits they were consolidated and common evidence was recorded in Regular Civil Suit No. 137 of 1977 and decided the suits by common judgment and decree dated December 30, 1978. The trial Court after considering the evidence on record and on appreciation and evaluation of the same held that the pedigree shown in the plaint was not correct. The plaintiffs had failed to prove the existence of custom excluding the widow and daughter from the inheritance. The trial court also held that deceased Nurbibi had the right to transfer and alienate the suit properties. The trial court also held that the plaintiffs have failed to prove that Nurbibi had only life time interest on the suit properties. It was also held that the suit transactions were legal and valid since Nurbibi was the owner of the suit properties. Lastly the trial court held that the plaintiffs were not entitled to decree as prayed for and also to the possession as well as mesne profit. The trial Court, therefore, dismissed the suits of the plaintiffs.

3.6. Aggrieved thereby the plaintiffs went in appeal before the District Court, Vadodara by filing six separate appeals being Regular Civil Appeal Nos.50 of 1979 to 55 of 1979. The learned 2nd Extra Assistant Judge, Vadodara, on reappreciation and reevaluation of the evidence adduced and produced before the trial court, came to the conclusion that the plaintiffs have failed to establish that Nurbibi had no right to sell or gift the properties received by her from her deceased husband Dulbha Dada and also failed to prove the existence of custom excluding widow and daughter from the inheritance and, therefore, Nurbibi had the right to alienate or transfer the suit properties and since no infirmity is found in the judgment and decree which was impugned before the lower appellate court, it dismissed the six appeals by confirming the judgment and decree recorded by the learned trial Judge, which has given rise to these six Second Appeals which have been admitted by this Court on the substantial questions of law to which reference has been made in earlier paragraphs of this judgment.

4. Mr. Dayamakumar, learned advocate for the plaintiffs, contended that notwithstanding the plaintiffs had produced ample documentary evidence to prove the custom as regards inheritance which was prevalent in Malek community of Anti village since the time immemorial which excludes the female members from inheritance and the female members have right of maintenance only during their life time, the lower appellate court has not considered the material documents which were produced vide mark 17/1, 17/3 and 85/1 and erroneously refused to exhibit those documents. What was emphasised by learned advocate was that the aforesaid documents were the public documents and, therefore, their proof need not have been insisted upon. According to him, both the courts below have committed grave error in not considering the aforesaid three documents. It was also stressed by learned advocate that the trial court has wrongly exhibited documents produced vide Exhs. 39, 60, 72, 75 and 93. It was also emphatically submitted by learned advocate that the trial court had erroneously relied upon the document Ex.74 which was produced by the defendants and on the basis of the said document recorded an erroneous conclusion that in Malek community of village Anti there was no custom to exclude female members from inheritance of the properties on the demise of husband. It was emphatically contended by learned advocate that both the courts below have erred in holding that the alleged custom was abrogated by Section 2 of Shariat Act, 1937 ('the Act' for short). Lastly it was maintained by learned advocate that the witnesses examined

unambiguously proved that the alleged custom excludes the widow and daughter from inheritance since they have only life time interest on the estate. It was, therefore, urged by the learned advocate that both the courts below have committed grave error in recording the decree and hence the substantial questions of law which have been formulated by this Court are required to be answered in favour of the plaintiffs and the decree recorded by the trial court and confirmed by the lower appellate court is bad in law and the same is required to be quashed and set aside by allowing the suits of the plaintiffs and the decree as prayed for by the plaintiffs may be recorded.

5. Mr. Bukhari, learned advocate for the defendants throughout supported the judgment and decree recorded by both the Courts below and further contended that there is no error either of law or facts in recording the impugned decree. It was emphatically submitted by learned advocate that in view of the evidence recorded before the trial court the documents marks 17/1, 17/3 and 85/1 were not public documents and further more they were incomplete and, therefore, the trial court had rightly disbelieved those documents and considered them inadmissible in evidence and rightly refused to exhibit those documents. It was stressed by learned advocate that once those documents were held inadmissible in evidence there was no proof on record of the case to show that in Malek community of Anti village there was a custom to exclude female members from inheritance of the property from her husband. What was emphasised by the learned advocate was that as per Section 2 of the Act, all customs and usages are being abrogated and, therefore, Muslim Woman would be entitled to inherit the property of her husband and since Nurbibi became independent owner of the property on the demise of her husband she had the right to alienate or transfer the property and in the instant case deceased Nurbibi was the sole owner of the properties of deceased Dulbha who had expired long back in the year 1927. What was stressed by the learned advocate was that the document Ex.74 which was an extract of the village form 8-A in respect of the property of plaintiff Nos.1 and 2 amply clarified that on death of Rasulbhai Amir, the agricultural lands and the properties which belonged to Rasulbhai Amir were mutated in the names of plaintiff Nos.1 and 2, Amina, widow of Rasulbhai Amir and Hasina, the daughter of Rasulbhai Amir. This fact unequivocally goes to show that there was no custom prevalent in Malek Community of Anti village by which female members were excluded from inheritance of property. It was also emphatically submitted by learned advocate that over and above there

was overwhelming evidence which amply corroborated the say of the defendants that there was no custom or usages prevalent in the Malek Community of village Anti to exclude female from inheritance. Relying upon the documents Exhs. 36, 37, 38, 79 and 83 which were copies of the registered sale deeds executed by female members of Malek community in favour of third party it was reiterated by the learned advocate that there was no such custom in Malek community of Anti village to exclude females from inheritance. It was lastly submitted by learned advocate that the substantial questions of law on which these Second Appeals have been admitted were already answered by the lower appellate court and hence they are not required to be again considered and appreciated by this Court while exercising powers under section 100 of the Civil procedure Code ('CPC' for short) which empowers limited jurisdiction upon this Court. It was, therefore, urged by the learned advocate that since there is no question of law much less substantial question of law in the present appeals, the same are required to be dismissed by affirming the judgment and decree recorded by the trial court and confirmed by the lower appellate court.

6. The pith and substance of the submissions of the learned advocates centers round the interpretation of the documents produced vide mark 17/1, 17/3 and 85/1 which were not exhibited since they were inadmissible in evidence.

7. Now let us examine and analyse what is the nature of the document produced vide mark 17/1. On having perusal of the document mark 17/1, it was a copy of the statements of leaders of Malek Community recorded by some officer on September 15, 1909. Admittedly, this document was more than 30 years old. On further perusal it could be assembled that statements of some members of Malek community were recorded but there was no mention whether those persons were the leaders of Malek community. There was also no evidence as to whether they had authority to make such statement for and on behalf of Malek community of village Anti. On further scrutiny of the said statement it could also be gathered that the designation of the officer before whom the statements were recorded was not mentioned. Moreover the said document was not shown to be a public document. The contention that since the document was more than 30 years old and it came from proper custody, a presumption would arise that the document was genuine and the contents thereof were correct under Section 90 of the Indian Evidence Act ('Evidence Act' for short) has no substance as Section 90

of the Evidence Act provides that the document of 30 years old coming from proper custody prove themselves i.e., no evidence need in general be given. The presumption permissible relates to the signature, execution or attestation of a document i.e., to its genuineness but it does not involve any presumption of correctness of every statement in it which may contain narratives of past events or that the contents of the document are true or that it has been acted upon. That must be proved like any other fact. So far as the document mark 17/1 is concerned, the plaintiffs have produced certified copy of the statement dated September 15, 1909 alleged to have been recorded by some officer. It may also be appreciated that the plaintiffs have not pleaded or made any case of loss or destruction of the original document and hence secondary evidence under section 65 of the Evidence Act is not admissible.

8. The Supreme Court in Harihar Prasad Singh v. Must. of Munshi Nath Prasad, AIR 1956 SC 305, held that there could be no presumption of genuineness in favour of certified copies of documents under Section 90 of the Evidence Act. The aforesaid view was reiterated by the Supreme Court in Tilak Chand Kureel v. Bhim Raj, (1969) 3 SCC 367 in the following words:

> "It was said that the presumption under Section 90 of the Evidence Act was not applicable as copies were produced and not the original documents. In our opinion this argument is well founded. In Basant v. Brijlal, 62 Ind App 180 : (AIR 1935 PC 132) it was held by the Privy Council that the presumption enacted in Section 90 of the Evidence Act can be applied only with regard to original documents and not copies thereof. The same view was taken by this court in Harihar Prasad Singh v. Must. of Munshi Nath Prasad (supra)."

Similar question had arisen before this Court in the case of Patel Manilal Chhaganlal v. The Municipal Corporation, Surat, AIR 1978 Gujarat 193. In the said judgment this Court has observed that Section 90 of the Evidence Act cannot be pressed in service for introducing the certified copies in evidence as the statutory presumption arising under Section 90 of the Act can be availed of only if the original documents are produced on record. The words "any document" and "is produced" used in Section 90 of the Act indicate that reference is to the original document and not to the certified copy of that document. In the said decision this Court has

further observed that once it is established that the original title deeds are lost or destroyed or are being deliberately withheld by the party against whom they are sought to be used, secondary evidence in respect of those title deeds can be tendered and if the secondary evidence happens to be certified copies of registered documents entered in Book No.1, the contents thereof can be read in evidence by virtue of sub-section (5) of Section 57 of the Registration Act.

9. In view of the discussion made hereinabove and relying upon the judgment of the Supreme Court referred to above and the judgment of this Court in the case of Patel Manilal Chhaganlal (supra), I am of the opinion that in the present case no statutory presumption under Section 90 of the Evidence Act had arisen and hence no secondary evidence under Section 65 of the Evidence Act is admissible since it is not a certified copy of registered document entered in Book No.1, the contents thereof can be read in evidence by virtue of sub-section (5) of Section 57 of the Registration Act. In view of the above discussion, I am of the opinion that both the trial Court and the lower appellate Court have rightly disbelieved the said document since it was inadmissible in evidence.

10. Now so far as the documents mark 17/3 and 85/1 are concerned, it may be appreciated that the trial court had also not believed the same. On having perusal of the said two documents it could be seen that they were certified copies of the judgment in Case No. 81 of 1893-94 and the judgment of appellate court in Appeal No. 198 of 1895-96. As per the said documents, the trial court had decided the suit in absence of the plaintiff and it dismissed the suit. The appellate court remanded the matter and the trial court again recorded the evidence of the parties and the appellate court thereafter dismissed the appeal. From the copies of the aforesaid judgments it was clear that the daughters were excluded from inheritance. It may be noted that on scanning the said two documents nothing could be noticed that they were certified copies. Moreover, the documents were incomplete. It did not even bear the signature of the appellate Judge. Final portion of the judgment of the appellate court was missing. The date of pronouncement also was not mentioned. On reappreciation and reevaluation of the aforesaid two documents there is no manner of doubt that the trial court has rightly disbelieved the said documents since they were incomplete and did not bear signatures and final portion of the order was also missing. In view of the aforesaid

discussion, I am of the opinion that both the trial court and the lower appellate court have rightly disbelieved the said two documents since they were inadmissible in evidence.

11. Now this takes me to the reappreciation and reevaluation of the oral evidence tendered by the parties before the trial court. It was contended by Mr. Dayamakumar that the oral testimony of the plaintiffs and their witnesses were wrongly disbelieved by the trial Court by misreading the same though the plaintiffs have examined in all four witnesses who have inter alia testified that in Malek community of village Anti as per custom females were excluded from inheritance. The trial court disbelieved their evidence and on reappreciation and reevaluation of the evidence the lower appellate court also disbelieved the same and in these circumstances I am of the opinion that the evidence based on factual aspects cannot be appreciated and examined in these Second Appeals. Therefore, I refrain myself from dealing with the said contention in this judgment and hold that the trial court has rightly refused to place reliance upon the evidence adduced on behalf of the plaintiffs. On the contrary, the defendants in order to disprove the custom alleged by the plaintiffs had placed reliance on documents Ex.30, 37, 38, 79, 80, 81, 82 and 83 which were copies of registered sale deeds executed in favour of third parties by females of Malek community of Anti village which categorically suggest that female members of Malek community of village Anti were allowed to hold property as per the provisions of the Act and there was no exclusion of their right of inheritance.

12. In the case of Pl. Pn. Subramanian Chettiar v. P.L.P.N. Kumarappa Chettiar, AIR 1955 Madras 144, the essential of valid customs were discussed by the Madras High Court. In the said judgment it has been held that a custom is a rule which in a particular family or in a particular district, has from long usage obtained the force of law. It must be ancient, certain and reasonable, and being in derogation of the general rules of law, must be construed strictly. It is further essential that it should be established to be so by clear and unambiguous evidence, for it is only by means of such evidence that the Courts can be assured of its existence and of the fact that it possesses the conditions of antiquity and certainty on which alone its legal title to recognition depends. It must not be opposed to morality or public policy and it must not be expressly forbidden by the legislature and the burden of proving such a custom is upon the person asserting it.

13. In view of the aforesaid discussion and the principles enunciated by the Madras High Court in the above mentioned judgment, both the courts below have rightly held that testimony of the plaintiffs and their witnesses was not trustworthy and their testimony does not get corroboration from any reliable or documentary evidence and observed that Ex.74 produced by the defendants which was village form 8-A in respect of the property of the plaintiff Nos.1 and 2 unequivocally showed that on the death of Rasulbhai Amir, father of plaintiff Nos.1 and 2, the agricultural lands belonging to Rasulbhai Amir were mutated in the name of the plaintiff Nos. 1 and 2, Amina - widow of Rasulbhai Amir and Hasina - the daughter of Rasulbhai Amir and from this it was established that there was no custom amongst the Malek community of Anti village that the females were excluded from inheritance of property. The aforesaid document gave fatal blow to the case of the plaintiffs since female members of the plaintiffs' family had inherited property and it was proved that there was no custom in the Malek community of village Anti to exclude the female members from inheritance.

14. Now this takes me to the last contention whether Section 2 of the Act abrogates one and all customs, including even succession of agricultural land. In order to appreciate the aforesaid question it would be advantageous to refer to Section 2 of the Act which reads as under:

> "Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract of gift or any other provision of personal law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula, and Mubaraat (h), maintenance, dower, guardianship, gifts, trust and trust properties, and wakfs, (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

15. On having perusal of the aforesaid provisions contained in Section 2 of the Act it is clear that the Act has come into force with effect from October 7, 1937 and operates throughout India. On further perusal of the

said provisions of the Section 2 of the Act it could be seen that after application and operation of the said Act the custom which excluded widow and daughter from inheritance cannot be pleaded. However, the question relating to agricultural land was saved as per the provisions of the said Section. So far as the instant case is concerned, the suit property consisted of not only agricultural land but immovable properties i.e., house as well. Therefore, so far as immovable properties i.e., houses were concerned, the custom which excluded the widow and daughter cannot be pleaded by virtue of Section 2 of the Act but so are as the agricultural lands were concerned, the custom which excluded the widow and daughter from inheritance can be pleaded. In this connection, it would be appropriate to refer to the judgment of the Madras High Court in the case of Mohamed Sandhukhan Rowther v. Ratnam, AIR 1958 Madras 114. In the said case, the Madras High Court has held that if there is property which could be the subject of intestate succession, then obviously, any custom in derogation of the rules of Muslim Shariat law such a custom merely excluding female heirs from inheritance and succession cannot be pleaded in view of the Shariat Act. In view of the aforesaid discussion and statutory provisions envisaged in the Act as also the judgment of the Madras High Court in Mohamed Sandhukhan Rowther's case (supra), I am of the opinion that so far as agricultural lands are concerned the custom which excluded widow and daughter can be pleaded. However, in the instant case, it will not be helpful to the plaintiffs since they have failed to prove that there was existence of custom in Malek community of village Anti to exclude the widow and daughter from inheritance. I ,therefore, answer the aforesaid question accordingly.

16. It may be appreciated that all the parties in the instance case are admittedly Suni Muslim. There is presumption that they belong to Hanafi school. Dulbha Dada had admittedly a son namely Ibrahim. On death of Dulbha Dada, his son Ibrahim inherited the properties. The properties vested in the sharer immediately on the death of the deceased. As per provisions of Section 65 of the Mohammedan Law the son is residuary heir and hence Ibrahim, son of Dulbha Dada, had inherited the whole property of Dulbha Dada. On death of Ibrahim, mother Nurbibi and sister Rasulbibi were entitled to inherit the property of Ibrahim. Ibrahim had no son and Nurbibi as mother of Ibrahim could get 1/3rd share and Rasulbibi as a sister could get 1/2 share and as Rasulbibi died Nurbibi had in all got 5/6 share in the property and hence she had every right to alienate the property as an

owner. It may also be appreciated that the plaintiffs were the heirs of Amir Motaji. Dulbha Dada died in 1927 and Amir Motaji had died prior to the death of Dulbha Dada. As per Mohammedan Law, pre-deceased heir had no interest in the property of the deceased Dulbha Dada and the plaintiffs who were the heirs of Amir Motaji were not entitled to inherit property of Dulbha Dada.

17. Seen in the above context, the substantial questions of law which have been formulated by this Court are answered accordingly and against the plaintiffs except question No.3. So far as question No.3 is concerned, it is held that Section 2 of the Act abrogates one and all customs except succession to agricultural land.

18. For the foregoing reasons, the appeals fail and accordingly they are dismissed with no orders as to costs.

25.7.2000. (A.M. Kapadia, J.)

(karan)